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IN THE

Supreme Court of the United States

OCTOBER TERM—1935.

Nos. 403, 404.

GEORGE ASHWANDER *et al.*,
Petitioners,

against

TENNESSEE VALLEY AUTHORITY *et al.*,
Respondents.

BRIEF FOR RESPONDENT THE CHEMICAL BANK & TRUST COMPANY.

COURTLAND PALMER,
JEHU T. STOKELY,
Attorneys for Respondent The Chemical Bank & Trust Company.

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BRIEF FOR RESPONDENT THE CHEMICAL BANK & TRUST COMPANY.

Statement.

In the interests of brevity, we have omitted a statement of facts of the issues in controversy, except so far as they relate to the Trustee, as a complete statement is made in the brief of petitioners.

The Chemical Bank & Trust Company was made a defendant in its capacity as successor-trustee under two mortgages of Alabama Power Company to United States Mortgage & Trust Company, dated respectively March 1, 1916, and June 1, 1921, pledging all of the property of the company within the State of Alabama to secure the several issues of bonds issued under the mortgages, it being shown that there were issued and outstanding in the hands of the public $70,921,000 of these bonds (R. I, 322; R. II, 1032).

The Trustee was formally put on notice by the service on it of demands made upon the management by petitioners and the filing of the bill that the proposed sale of the property was for a sum equivalent to approximately 60 per cent. of its

bare replacement value, and that the transfer was in furtherance of an objective which meant disintegration of the mortgaged property and was in furtherance of an illegal program.

A release by the Trustee was in due course requested in order for the company to consummate the sale of the property and other facilities covered by the contracts of January 4, 1934, and August 9, 1934, to T. V. A. (R. I, 328). The Trustee refused to release the property from the liens of said mortgages as the action and notices served on it showed the consideration proposed to be paid was inadequate, i. e., about $2,800,000 less than the fair value of the property and transmission lines proposed to be conveyed and upon the further ground that the Act of Congress of May 18, 1933, creating T. V. A. and the objects proposed to be accomplished thereby were unconstitutional (R. II, 1031-1033).

The conveyance of the properties under the contract of January 4, 1934, and the acts proposed under it, would have had the effect of drying up the Alabama Power Company's franchises, licenses, business and system in five entire and two fractional counties in northeast Alabama, by splitting off the transmission lines and sources of power serving seventeen urban distribution systems, and about 10,000, or one-tenth, of the company's customers (F.* 14, R. II, 1038).

This initial contract plainly worked an immediate mutilation of the Power Company's system, and with the policy set forth in the statute, the contract of August 9, 1934, together with overt acts of T. V. A., showed a clear purpose on the part of the Tennessee Valley Authority to take other parts of the property and system of the Alabama Power Company at inadequate and forced prices and thus endanger the value of the stockholders' equity and the security of these mortgagees (R. II, 1032). This was all in furtherance of a stated purpose on part of T. V. A. to use the property for the operation of a commercial electric distribution system within the State, stated by it to be the dominant objective of the program (F. 26, 27, 28, R. II, 1042; F. 70, R. II, 1059). It is regarded by us as clear that the stockholders had the right

*"F." herein refers to findings of fact; "C." to conclusions of law.

to protest and upon due compliance with Equity Rule 27 to file suit (F. 18, R. II, 1039; C. 23, R. II, 1099). And certainly this respondent had the duty to join with the plaintiff in asking the protection of the Court to declare the statute and the program instituted thereunder illegal and unconstitutional, to protect the security afforded by the mortgages which was threatened with loss (Answer, R. I, 329-332).

Hill v. *Wallace*, 259 U. S. 44.
Dodge v. *Woolsey*, 18 How. 331.
Chicago v. *Mills*, 204 U. S. 321.
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Smith v. *Kansas City etc. Co.*, 255 U. S. 180.
Brushaber v. *Union Pacific*, 240 U. S. 1.

The Chemical Bank & Trust Company filed an answer to the petition (R. I, 321). In its answer it made application for cross-relief of the same nature as that prayed for by the petitioner, asserting that the consideration to be paid for the properties was inadequate and would in effect take the properties and franchises of the Power Company without just compensation and would for other reasons be violative of the constitutional rights of the company and the bondholders. It also alleged that if the acts of the respondent T. V. A. were illegal, and if it intended, as it stated, to expand its program throughout the State of Alabama, that then, by threats of duplication of the facilities, property values would be greatly depreciated, which would cause the Alabama Power Company to sell to the T. V. A. at inadequate prices, and would result in the loss of the properties, franchises and distribution systems, etc., of the Alabama Power Company, so that the bondholders may only be paid one-half of their investment. (See Offer of Proof, R. II, 1032-1033.)

Respondent, therefore, prayed that the Court would fix the fair market value of the property and franchises proposed to be taken if the acts of the T. V. A. were legal, and, if illegal, that the T. V. A. be restrained from carrying out the illegal acts complained of by the petitioners.

The respondent had a duty under the indenture of mortgage to protect the *res* securing the bondholders and their investment when the same was threatened with loss or destruction and to ask the court of equity for its protection.

Globe Woolen Co. v. *Utica G. & El. Co.*, 224 N. Y. 483.

The District Court having declared the contracts and acts of the T. V. A. unconstitutional, this respondent did not appeal, as the interest of the bondholders was thus protected. As the Circuit Court of Appeals for the Fifth Circuit has reversed the judgment of the District Court, the interests of the bondholders, represented by this respondent, are jeopardized, and respondent is thus filing a brief in support of their rights.

The Power Company was and is confronted not merely with the severing of the transmission lines serving its seventeen urban distribution systems, but with T. V. A. competitive duplication of its entire system throughout the State of Alabama by aid of P. W. A. loans, plainly threatening the entire value of its properties and the certain loss of its franchises and business.

The Trustee, charged with responsibility under the mortgages for the preservation of the mortgage security, conceived that the inadequacy of the consideration tendered by T. V. A. should be considered by the Court. The District Court thought not (R. II, 1033), and evidence to that effect was not received. The record on that point, however, is adequate, since, for some reason, the parties themselves stipulated in the exhibits to the contract of January 4, 1934 (R. I, 152), that the replacement value of the property to be sold was in amounts which on comparison with the contract price, are found to be practically double the contract prices (R. II, 1032). The Court excluded all question of adequacy

of consideration on the theory that the contract being in furtherance of proposed illegal operations by T. V. A. of a utility system, made immaterial any other ground of inadequacy resulting from business compulsion or administrative malevolence (*American Trust Co.* v. *Federal Reserve Bank*, 256 U. S. 350). With its conclusion *on that premise* there can be no quarrel, but to limit the decree practically to the bare annulment of the contract of January 4, 1934, when the record shows that the entire system of the Power Company and its property as a whole was menaced, and, consequently the security of the mortgages endangered, is plainly not a full and adequate decision of the basic controversy clearly justiciable and presented on this record.

That issue in controversy cannot be fairly disposed of on this complete record by a decree related merely to the contract of January 4, 1934.

Hence the appeal by the plaintiffs from the decree in their favor (R. III, 1278 *et seq.*). See appropriate assignment of errors by the plaintiff-cross-appellants (R. III, 1295), pointing out, and in our opinion correctly, the respects in which the final decree of March 2, 1935, adjudicating the constitutional invalidity of the T. V. A. program and the related contract of January 4, 1934, did not settle the entire controversy.

The District Court plainly recognized that supplemental relief would be necessary.

> "(27) This Court has, in the view taken of the relief to which plaintiffs are entitled, given no consideration to the request or prayer of plaintiffs for a declaratory judgment or to any phase or matter of relief not reflected in the final decree herein and in these conclusions of law and is without prejudice to such further independent or supplemental relief as may hereafter be sought by plaintiffs or by the Alabama Power Company in its own right" (C. 27, R. I, 1101).

The case appears clearly one for declaratory relief under the Act of June 14, 1934 (Act Public No. 343, 73rd Congress, 28 U. S. C. A., Sec. 400; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *United States* v. *West Virginia*, 79 L. Ed. Adv. Op. 848).

It is respectfully submitted that the practice of this Court as exemplified in *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, at page 414, calls for broad consideration on this record. The program of the Tennessee Valley Authority is a manifest and admitted program for the proprietary ownership and operation of a power system by the National Government as a precedent for like action throughout the United States.* The defense that it is merely and rationally the innocent disposal of surplus manufacturing capacity created in *bona fide* exertion of the war power or the improvement of navigation is not sustained by the record and is expressly repudiated by the findings.

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*"A far-sighted experimental program of regional planning was entrusted to the Authority, the principal objectives in the field of power development being to popularize the use of electricity by the sale of cheap power, and to provide a 'yardstick' with which to compare the relative advantage of private and public ownership and operation. Since then a number of other federal power projects have been begun, the most important being the Grand Coulee and Bonneville Dams on the Columbia River, and the Fort Peck Dam on the upper Missouri. Plans for a huge project on the St. Lawrence River are awaiting the negotiation of a treaty with Canada."—44 Yale L. J. (1934), 326-327.

In his message transmitting the T. V. A. Act to Congress, the President stated that if this program was successful it could be utilized in a like development of other projects (77 Cong. Rec., 1423 [1933]).

"Also a number of bills were introduced during the last session of Congress, contemplating similar developments in other areas: 78 Cong. Rec. 25 (1934), H. R. 6224 by Mr. Hastings, proposing the creation of the Arkansas Valley Authority; 78 Cong. Rec. 56 (1934), S. 1973 by Mr. Norris, proposing a similar development of the Missouri and Mississippi Valleys; 78 Cong. Rec. 133 (1934), H. R. 6368 by Mr. Marland, concerning the development of the Arkansas River; 78 Cong. Rec. 9067 (1934), H. R. 9669 by Mr. Greenwood, concerning the development of the Wabash and White Rivers. Senator Dill of Washington is apparently backing the creation similarly of a Columbia Valley Authority to operate the Bonneville and Grand Coulee Dams (cf. New Outlook, July, 1934, at 48-52), and proponents of the St. Lawrence project are asking for a federal corporation on the lines of the TVA to take charge of it. U. S. News, Oct. 8, at 664, col. 7. The first example of this type of administrative device was created in New York State in 1931, and the TVA is closely analogous to it in almost all respects. See N. Y. Laws 1931, c. 772. The creation of such agencies to take charge of the new federal project seems quite probable, for it is doubtful whether the method followed at Boulder Dam of contracting for the sale of power at the dam would be satisfactory because of present surplus capacity in these relatively thinly populated areas."—44 Yale L. J., 327-337.

Immediately threatened with the loss of one-tenth of its customers, the certainty of extension of the program throughout Alabama made mandatory by the Act, the petitioners' action praying for a declaratory judgment was plainly not premature under *Pennsylvania* v. *West Virginia*, 262 U. S. 553.

The impediment to a remedy under the Declaratory Judgment Act of June 14, 1934,* which was lacking in the Boulder Dam case (*Arizona* v. *California*, 283 U. S. 423), is not lacking in this proceeding.

Here there is a present justiciable remedy, to which, in order to render appropriate relief, it is indispensable that there be added injunctive or declaratory relief against those aspects of threatened competition by agencies of the Federal Government which are alleged and shown to be in violation of any lawful federal function.

Obviously the Alabama Power Company cannot compete with federal distribution of power, at subnormal rates, marketed under the irresistible pressure of free distribution systems to the towns, and twenty-thirty year contracts purporting to bind the Federal Government.

The Chemical Bank is necessarily interested in the protection of the Power Company against successive demands for release of utilities properties (or the alternative of competitive exhaustion) forced by the overwhelming compulsion shown on this record.

If the Government may employ its credit, its twenty-thirty year commitments in threatened commercial duplication and competition with utility properties under the circumstances shown on this record, neither this nor any other similar mortgage security is safe from federal taking by competition and exhaustion to a point of sale on a salvage basis.

Therefore it becomes important to the petitioners and this respondent that this Court consider the broader aspect of this case as prayed in No. 404 and decide the constitutionality of the whole T. V. A. program.

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* Public Act 343, 73rd Congress, 28 U. S. C. A., Sec. 400.

POINT I.

The settled decisions of this Court are opposed to the conclusion of the Circuit Court of Appeals that the Federal Government acquires a proprietary right in the waters or in their use when impounded by navigation dams.

The opinion of the Circuit Court of Appeals contains this statement (R. III, 1306-1307):

> "The Government by virtue of its lawful ownership of Wilson Dam owns also the water power inevitably created by the construction of that dam. Kaukauna Co. v. Green Bay &c. Co., 142 U. S. 254; Green Bay &c. Co. v. Patten Paper Co., 172 U. S. 58; United States v. Chandler-Dunbar Co., 229 U. S. 53. Congress, in the exercise of its power, under Art. IV, Sec. 3, cl. 2, of the Constitution, to dispose of property belonging to the United States, may dispose of water power created at Wilson Dam as freely as it may of any other Government property. It never heretofore has been held that the right of disposal exists only as to such part as is accidentally produced in excess of the amount strictly necessary for purposes of national defense or of navigation; but always that right has been supposed to extend to all the excess or surplus. Water power is property sui generis; unlike most other forms of property it cannot be put away and kept for future use or sale, but it must be either converted into electricity and used up as it is released from storage or allowed to go to waste. If the water stored at Wilson Dam is permitted to pass through the penstocks, in the language of counsel for T. V. A., 'there is gold in it,' but if allowed to flow unhindered over the dam 'it is gone forever.' As a practical matter there would be no market for the incidental or accidental surplus created in the honest effort to produce only enough electricity to supply strictly governmental requirements; for no user, public or private, of electricity would become a customer unless assurance could be given of a firm and dependable supply. That the surplus or any of it need not be allowed to go to waste, but that it and all of

it may rightfully be disposed of and the proceeds applied toward reimbursement of the cost of a publicly-owned dam is well settled. Kaukauna Co. v. Green Bay &c. Co., supra; United States v. Chandler-Dunbar Co., supra.; Arizona v. California, 283 U. S. 423."

The necessary interpretation of the conclusion stated is that whenever and wherever the Government of the United States constructs a dam for the improvement of navigation under the authority of the Commerce Clause, it becomes by virtue of that construction vested with a proprietary right to use the impounded waters in the process of commercial manufacture of electricity without reference or relation to the regulation of navigation, and may exclude the States and their grantees from the utilization of the surplus waters not necessary to be manipulated in furtherance of navigation.

The term surplus water used in the connection with navigation improvements means necessarily that water which is not necessary to be used in furtherance of navigation. The conclusion of the Circuit Court of Appeals is that such surplus water is a commodity in which the Government of the United States has a proprietary interest; that it can process that commodity through turbo-generators in the manufacture of electricity and market the resulting power as a proprietary right of the Government.

This conclusion is unwarranted and unsound, is contrary to settled adjudications of this Court, misinterprets the effect of the cases cited in the above-quoted extract from the opinion, and will, unless reviewed and corrected by this Court in this proceeding, gravely and adversely affect and destroy the sovereign rights of the States and of the people protected by the Constitution.

That no such proprietary right exists is, we submit, axiomatic.

Pollard et al. Lessee v. *Hagan*, 3 How. 212.
Shively v. *Bowlby*, 152 U. S. 1.
Port of Seattle v. *Oregon-Washington Ry.*, 255 U. S. 56.

The decisions cited are merely outstanding representatives of a long and unbroken line. In the *Port of Seattle* case, the Court said:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same (Weber v. State Harbor Comrs., 18 Wall. 57, 21 L. Ed. 798). * * * *The character of the State's ownership in the land and in the waters is the full proprietary right.* The state, being the absolute owner of the tide lands and of the waters over them, is free, in conveying tide lands, either to grant with them rights in the adjoining water area, or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548." (Italics ours.)

In *Wisconsin* v. *Illinois,* 278 U. S. 367, the Court decisively denied the right of the Federal Government to control or divert navigable waters for purposes other than the regulation of navigation. The conclusion of the Circuit Court of Appeals is plainly inconsistent with one of the epochal decisions of this Court, *Kansas* v. *Colorado,* 206 U. S. 46, which stands to-day undiminished in authority. The principle of decision in that case was recognized by its citation in the *Boulder Dam* case (*Arizona* v. *California,* 283 U. S. 426), and the citation of the latter by the Circuit Court of Appeals as authority for its conclusion, inconsistent with *Kansas* v. *Colorado,* cannot, we submit, be justified.

The assertion of proprietary right claimed by T. V. A. is much less justified from a Federal function standpoint than was the claim asserted on behalf of arid Federal domain in *Kansas* v. *Colorado.* In that case water was indispensable to reclamation. In this case power production on a com-

mercial scale (beyond the fragment necessary to the actuation of the locks) is wholly unnecessary to the function of navigation.

Pointing out that the right of legislation as to territories gave Congress full municipal jurisdiction within a territory, but that, as to the public domain within the confines of the states, legislation for the national domain could not override state laws in respect to the general subject of reclamation even in those states where the need was urgent, this Court said (206 U. S. 46):

> "The full scope of this paragraph [Art. IV, Sec. 3, Cl. 2] has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property.' * * * *But clearly does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.*" * * *

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> "As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only in the Western and newer States, yet *the powers of the National Government within the limits of those States are the same* (no greater and no less) *than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders.* Nor do we understand that hitherto Congress has acted in disregard to this limitation." (Italics ours.)

and continued (citing with full approval *Pollard* v. *Hagan*, *Shirley* v. *Bowlby*, and citing the first Green Bay case

[*Kaukauna Water Co.* v. *Green Bay Canal Co.*], 142 U. S. 254, as an authority *relating solely to the question of local law*) with this significant expression:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

The Circuit Court of Appeals Has Misconstrued the Decisions in the Green Bay Cases and the Chandler-Dunbar Case.

The certainty of this conclusion does not require an elaboration of the analysis of the decisions. It is sufficient to point out that the line of cases referred to in the proposition, properly construed, afford no basis whatever for the conclusion announced by the Circuit Court of Appeals.

(1) This Court definitely decided in the first *Green Bay* case (*Kaukauna Water Co.* v. *Green Bay Canal Co.*, 142 U. S. 254) that the proprietary control of the water rights did not follow as an incident to the erection of a navigation dam. On the contrary, it expressly decided that it was necessary for the State which had erected the dam to acquire these water rights by condemnation, and the only question decided was that the condemnation of the water rights would, in accordance with the Constitution and decisions of the State of Wisconsin, constitute a public purpose authorizing condemnation by the State, and was therefore not in violation of the Fourteenth Amendment.

That decision is not only not authority for the finding of the Circuit Court of Appeals, but it is express authority to the contrary.

(2) The second *Green Bay* case (*Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58) was decided necessarily on the strength of the proprietary right in the water power (that is, right to control the waters for the creation of power at the dam in question) which had been absolutely acquired by the State and in turn passed on to the Green Bay Com-

pany. That circumstance settled for all time as between all owners of banks and beds on the Fox River the right to use the water power passing the navigation dam at that point. The statutory procedure approved by the Court in the first *Green Bay* case, and adhered to in the second *Green Bay* case, was sufficient as a condemnation of all water rights throughout the stream in so far as they were reasonably necessary or desirable to be used in the creation of water power at the dam sight in question.

Hence, when the Patten Paper Company and other riparian and bed owners below the dam complained of the concentration of waters by the Green Bay Company at the dam for the generation of power, it was perfectly obvious that all such rights had been long since condemned and acquired by the Green Bay Company.

Under these circumstances, the superior right of the Green Bay Company as between riparian proprietors upstream and downstream was referable to the absolute title which the Green Bay Company had acquired from the State of Wisconsin.

The Court was careful to point out that after the power had been extracted from the water at the dam, it would not be assumed that the government officials would undertake so to dispose of the waters of the stream as they emerged from the tail race as to affect adversely the rights of any owners of lands in the respective channels in which those waters had been accustomed to flow below the dam, and the opinion on rehearing in the second *Green Bay* case, 173 U. S. 179, expressly disclaimed any notion under the power to improve navigation that the Government could arbitrarily divert the waters from their customary channels.

(3) In the *Chandler-Dunbar Water Co.* v. *United States* case, 229 U. S. 53, the company which failed to sustain its right to compensation for condemnation of the element of water power value in the bed and banks of the river lost that claim not because the Federal Government *owned the water power as such* or the right to the power or to the water or to any surplus water or any right, except the right to manipu-

late it *for navigation alone*, but did have the full right to prevent Chandler-Dunbar from erecting, at any part of the bed of the stream owned by it, a power structure. Hence, there was no value in a water power which could not be utilized except by an obstruction to interstate commerce which the Government had affirmatively decided against.

Any further decision on that question was plainly *obiter* and obviously references to cases sustaining the proprietary right of the State, unquestionably vested in the State under the doctrine of *Pollard et al. Lessee* v. *Hagan*, are inappropriately cited as authority or as an analogy in interpreting the power of the Federal Government over navigation under the Commerce Clause.

The opinion and conclusion of the Circuit Court of Appeals, confusing and misapplying these principles, are of grave importance and require clarification in the public interest.

The erroneous application by the Circuit Court of Appeals of these cases has been directly and decisively disposed of in the case of *Wisconsin* v. *Illinois, supra*, in which it is asserted that the right of Congress over navigable waters must have a positive relation to the regulation of navigation, and cannot be exerted where the dominant and primary purpose of the diversion or control is some non-federal objective such as the disposal of sewage or the creation of water power.

In that case this Court said (p. 415):

> "This Court has said that while Congress in the exercise of its power may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Co., 229 U. S. 53, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. United States v. River Rouge Improvement Co., 269 U. S. 411, 419; Port of Seattle v. Orgeon & Washington R. R., 255 U. S. 56, 63.
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> * * * * * * *

"'There is no doubt that the diversion is primarily for the purposes of sanitation. Whatever may be said as to the service of the diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District. The purpose of utilizing the flow through the drainage canal to develop power is also undoubtedly present, although subordinated to the exigency of sanitation. So far as the diverted water is used for the development of power, the use is merely incidental. This Court, in Sanitary District v. United States, 266 U. S. 405, 424, in describing the channel, looked upon its interest to the Sanitary District "primarily as a means to dispose of the sewage of Chicago," although it was also "an object of attention to the United States as opening water communication between the Great Lakes and the Mississippi and the Gulf."'"

The Government Has No Right to Condemn Either Water Rights or Lands for Purposes Not Having a Positive Relation to a Substantive Federal Purpose, and Cannot, Accordingly, Acquire or Condemn Water Rights for the Purpose of Engaging in Commercial Manufacture of Electricity for Non-Federal Purposes.

This proposition is fully sustained by the acceptance in *Brown* v. *United States*, 263 U. S. 78, 83, of the opinion of the Supreme Court of Massachusetts in the opinion *In re Opinion of Justices*, 204 Mass. 607, 27 L. R. A. (N. S.) 483. This opinion was extended and restated in *In re Opinion of Justices*, 204 Mass. 616, 91 N. E. 578, and was again considered and applied in *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 46 L. R. A. (N. S.) 1195.

The same doctrine has been definitely stated and applied in *Richmond* v. *Carneal*, 129 Va. 388, 14 A. L. R. 1341, and finds support in the traditional statements of the limitations

upon governmental authority set out in 1 *Lewis Eminent Domain,* Sec. 1; *Cooley, Constitutional Limitations,* 6th Ed., p. 651; *Nichols Eminent Domain,* p. 178; *Maumee Valley Elec. Co.* v. *Schlesinger,* 37 Fed. (2d) 318 (D. C. S. D. Ohio, 1928).

Under these circumstances, it is denied categorically that the Government of the United States has any right to acquire lands beyond and in addition to those necessary for the governmental purpose in order to subject them to perpetual commercial use with the idea of reimbursing the Treasury for a federal expenditure.

This precise contention was adequately considered and denied in the cases cited.

There is nothing in the *Green Bay* cases which remotely justifies a contrary conclusion.

In *Brown* v. *United States,* 263 U. S. 78, the Court sustained the right to acquire property not attingent upon the stream or affected by the proposed floodage of the irrigation improvement, where acquired for the express purpose of exchanging lots with the owners of property attingent upon the stream whose holdings would be flooded by the improvement. This was a mere determination that this method of dealing with a complicated problem of compensation by relocation had a reasonable relation to the governmental purpose intended, a conclusion which was obviously sound; but the case does not take issue with—on the contrary it accepts—the conclusion of the Massachusetts Court and plainly distinguishes between the peculiar circumstances presented in the *Brown* case and the idea of commercial operations in order to reimburse the Treasury.

In the *Brown* case the Court asserted that its conclusion is not sought to be justified only as a way for the United States

> "to reduce the cost of the improvement by an outside land speculation."

In the case at bar the effort is sought to justify the usurpation of the water rights (without condemnation) in an outside speculative conduct of the commercial business of power manufacture and distribution.

In the *Brown* case, the Court asserted that the "transaction is not properly described as the condemnation of land of one private owner to sell it to another. The incidental fact that in the substitution and necessary adjustment of the exchanges a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States."

Obviously *Brown* v. *United States* is no authority for the contention that the Government could occupy the residuum of lots held as a result of the acquisition of the substitute plat for the purpose of establishing a plant for the commercial manufacture of electricity, in order to liquidate the cost of the irrigation project.

POINT II.

The primary purpose of the Tennessee Valley Authority Act of 1933 was the generation and sale of electric power in a proprietary business and was not a valid constitutional exercise of power by Congress.

The history of the T. V. A. project shows that, in so far as the activities challenged on this record are concerned, it is and always was an electrical power project. Since the end of the war the question has been whether Muscle Shoals should be operated privately or by the Government.*

In 1928 Congress passed the Norris Bill, favoring Government operation of Muscle Shoals, but President Coolidge

* Mitchell, 1933 (77 Cong. Rec. 2256).

killed it by a pocket veto. Again in 1931 Congress passed a similar measure, and President Hoover vetoed it.*

The veto message of President Hoover clearly shows that the whole project was one for the generation, distribution and sale of electrical power. He said in part:

> "The purpose of the bill is to provide production and wholesale distribution of surplus power and to give preference to States, municipalities, and co-operative organizations. * * *
>
> "* * * *But for the Federal Government deliberately to go out to build up and expand such an occasion to the major purpose of a power and manufacturing business is to break down the initiative and enterprise of the American people;* * * *
>
> "This bill raises one of the important issues confronting our people. That is squarely the issue of Federal *Government ownership and operation of power and manufacturing business* not as a minor by-product but *as a major purpose.* * * *
>
> *"This bill distinctly proposes to enter the field of powers reserved to the States."* (Italics ours.)

The main and controlling purpose of the Act, as shown on its face, is for the generation, transmission and sale of electrical power in a proprietary business conducted by the Federal Government (Sec. 2, "f"; Sec. 4, "i," "j"; Sec. 5, subd. 1; Secs. 10, 11, 12, 15, 17, 18, 32). These dominant purposes were exactly what the District Court found to be the objectives of the program (R. 7, 10-11, 12, 14, 17-19; R. II, 1092, 1094-1096).

Of the electricity produced (1926-1933) at Wilson Dam of an annual average of 328,000,000 kilowatt-hours, only

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* See 74 Cong. Rec. 7046; Senate Report 831 (Part 1—Mr. Norris for Committee on Agriculture; Part 2—Minority Report), 67th Congress, 2nd Session, 1922; Congressional Debates on T. V. A. Act (77 Cong. Rec., pp. 2189, 2196, 2251, 3591).

Veto Message, 74 Cong. Rec. 7046.

Hearings before Senate Committee on Agriculture on S. J. R. 49, Muscle Shoals, 71st Congress, 1st Session, 1929; Congressional Debates on T. V. A. Act (77 Cong. Rec., pp. 2186, 2194, 2197, 2248, 3597).

7,000,000 kilowatt-hours annual average were used for governmental purposes (F. 54, 55, R. II, 1051-1052).

There is being constructed in Norris Dam three emplacements and two generators; in Wheeler Dam eight emplacements and one generator; in the proposed Pickwick Dam six emplacements; and the steam plant at Sheffield.

It must therefore be resolved that the construction of Norris, Wheeler, Pickwick Dams and the steam plant at Sheffield were for the *sole* purpose of creating power. When Wilson is supplemented with Norris, Wheeler and Pickwick Dams there will be a generating capacity of 2,500,000,000 kilowatt-hours generated annually (F. 50-53, R. II, 1049; F. 149-150, R. H, 1085). Thus it is conclusively established that the sole purpose of the "project" is to develop and sell electric power. Not as a surplus to governmental needs, as they already have a surplus of 321,000,000 kilowatt-hours annually at Wilson Dam, but solely for the generation of electric power to sell to municipalities and the rural districts of Alabama as a means of regional planning (F. 26-28, pp. 1042, 1043).

The T. V. A. from the outset considered that it had received a mandate from Congress to establish as a permanent and independent commercial function a Government-owned electric generation and distribution system for the Tennessee Valley (F. 26, 28, R. II, 1042, 1043).

The T. V. A. considered its power project to be a complete network to be the equivalent of existing utilities and have the same characteristics with steam stand-by facilities as the utility companies in the area (F. 32, p. 1045; F. 69, p. 1059). It is so stated in "the power policy of the T. V. A." as announced by the T. V. A. on August 25, 1933 (Ex. 3, attached to the bill of complaint, R. I., 108).

The T. V. A. acted upon this program at the time suit was filed (October 8, 1934, p. 1), and had acquired Tupelo, Miss., distribution system and was operating it and had started the construction of rural lines in Mississippi and Alabama, and had contracted to take over the transmission lines of the Alabama Power Company in the area by contract of January 4, 1934, and the urban distribution lines by con-

tract of August 9, 1934, in pursuance of the power program of the "project" (F. 75-77, R. II, 1067-1065; for complete list; F. 80, 84-85, 89, R. II, 1068).

T. V. A. contemplated expanding its electric utility system in this area by wholesale and retail sales of electricity and if the privately-owned utilities in the area (F. 65-69, pp. 1058-1059) did not sell their plants and distribution systems at the sacrifice prices demanded (offered) by T. V. A., they would suffer the consequences—duplication and thereby destruction (F. 65-69, 72, 80, R. II, 1058-1059, 1061, 1065).

The objects and purposes sought to be accomplished by the T. V. A. "project" are (a) to establish what has come to be nationally known as a power "yardstick" (F. 70-71, R. II, 1060-1061).

T. V. A. established the Electric Home and Farm Authority, Inc., a Delaware corporation, to sell electrical appliances and increase the amount of electricity to be consumed and ultimately to be sold by it in the commercial market (F. 96-103, pp. 1070-1072).

A mere statement of the above findings of fact without argument shows that the dominant purpose of the "project" was and is the generation and sale of electric power in a proprietary business in competition with private utility companies.

The Court found that the commercial sale of power in times of peace has no relation to and is not in furtherance of navigation, flood control, soil erosion, national defense or other governmental functions (F. 106, p. 1073).

Section 26-a of the Amendment to the Act (approved August 31, 1935) gives the Board authority to prohibit the construction of any dams, works, or other obstructions affecting navigation or flood control along the Tennessee River or its tributaries, without permission of the Board. This prohibits any power companies from completing or building any power dams whatsoever and was enacted for the purpose of preventing power companies from proceeding with contemplated power projects and prevent them from

competing with T. V. A. in the power business, not navigation, giving T. V. A. exclusive control over all power sites on the Tennessee River and its tributaries (F. 78, p. 1065).

Paraphrasing the language of Chief Justice Taft in the *Child Labor Tax* case, 259 U. S. 20, 37, in the light of these features of the Act, "a court must be blind not to see that the so-called" T. V. A. program and all of the Acts threatened on this record have not as their dominant objective the permanent establishment by the Government of the power business, in competition with private industry.

As was further said by the same learned Chief Justice in the *Child Labor Tax* case, *supra*:

> "Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

POINT III.

The generation and sale of electric power in a proprietary business by the National Government are not authorized by the Constitution.

The precise question now raised, as to whether the United States Government, being one of enumerated powers, and there being no provision in the Constitution authorizing same, can go into the business of generating, distributing and selling electrical power, has never been raised or decided by this Court.

This Court, however, has decided very definitely and distinctly, that matters of local concern, such as the manufacture of goods and their sale and distribution within the States, are exclusively within the control of the States.

> *United States* v. *E. C. Knight Co.*, 156 U. S. 1.
> *Addyston Pipe Co.* v. *United States*, 175 U. S. 211.

The high dam program was in violation of the River and Harbor Act (approved July 3, 1930, 46 Stat. 918, 927-928),

as there was no specific congressional authority to build such dams (*United States* v. *Arizona*, 79 L. Ed. Adv. Op. 681 [March, 1935]).

The Court is not bound by the declaration of purposes contained in the Act, but may determine its real purpose by considering its effect (*Hill* v. *Wallace*, 259 U. S. 44; *People* v. *Compagnie Generale Trans.*, 107 U. S. 59, 63; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 319; *Foster Fountain P. Co.* v. *Haydel*, 278 U. S. 1, 10).

In *Linder* v. *United States*, 268 U. S. 5, 17, the rule is stated as follows:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced. McCulloch v. Maryland, 4 Wheat. 316, 423; License Tax Cases, 5 Wall. 462; United States v. DeWitt, 9 Wall. 41; Keller v. United States, 213 U. S. 138; Hammer v. Dagenhart, 247 U. S. 251; Child Labor Tax Case, 259 U. S. 20."

A. The generation of power is a local and not an interstate function.

In the case of *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, the Supreme Court held that the generation of electricity by water power passing through a generator was a separate and distinct process, and constituted production separate and distinct from the transportation. This Court said:

> (P. 180.) "We think, therefore, it wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here in consideration is concerned, to the manufacture of physical articles of trade and as subsequent shipment

and transportation in commerce. * * * The evidence amply sustains the conclusion that this transformation (from water power through generator to electricity) must take place as a prerequisite to the use of the electrical product, and that the process of transferring, as distinguished from that of producing, the electrical energy, begins not at the waterfall, but definitely at the generator, at which point measuring appliances can be placed and the quantum of electrical energy ascertained with practical accuracy. * * *

"We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the Commerce Clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. Cornell v. Coyne, 192 U. S. 48; 428 429. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E. C. Knight Co., 156 U. S. 1, 12.

"Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. *So far as it produces electrical energy in Idaho its business is purely intrastate, subject to taxation and control.* In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof, is subject to the paramount authority of the Commerce Clause of the federal Constitution." (Italics ours.)

See, also:

Hope Gas Co. v. *Hall*, 274 U. S. 284;
Oliver Iron Co. v. *Lord*, 262 U. S. 172,

both cited in the above case.

It is, therefore, definitely established that the generation of electricity by water power constitutes manufacture and production, and is subject to the local laws and control of the States and is not a federal function.

Schechter v. *United States*, 295 U. S. 495.

In the case of *Hammer* v. *Dagenhart*, 247 U. S. 251, 272, this Court said:

> "Commerce 'consists of intercourse and traffic * * * and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. v. Yorkonis, 238 U. S. 49.
>
> "Over interstate transportation or its incidents, the regulatory power of congress is ample, but the production of articles intended for interstate commerce, is a matter of local regulation."
>
> (P. 273.) *"There is no power vested in Congress to require the states to exercise their police power* so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws and conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. * * *
>
> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture."
>
> (P. 275.) "The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institution as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.
>
> "In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government, and to them and to the people the powers not expressly delegated to the national Government are reserved. Lane County v. Oregon, 7 Wall. 71, 76."
>
> (P. 276.) "We have neither authority no disposition to question the motives of congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by the invasion of the powers of the states.

> *"The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."* (Italics ours.)

The same result would be effected if the Government can go into a proprietary business within a State to compel utilities to charge cheap rates.

It is thus definitely established that the generation of electricity is a local and an intrastate function, reserved to the States or to the people; that the right or power to regulate and control interstate commerce does not give Congress the right to go into the electric power business to make the States exercise their police powers so as to give the people cheap electric light rates.

B. The generation and sale of electric energy is not an incident to navigation and is not authorized by the Constitution.

The findings of fact establish

> "that there is no physical or functional relation between the installation of hydro-electric units (or the generation of energy thereat) in *intentional* excess of any capacity required for the actuation of locks and dams and related purposes in or as a part of navigation dams and the regulation of navigation" (F. 106, p. 1072).

The District Court further found that the generation of electricity was physically distinct and separate from the sale thereof (F. 36, p. 1045).

That the States and municipalities may go into proprietary business in competition with its citizens where the dominant objective is a public purpose cannot be doubted as they reserved those powers in creating the National Government.

Green v. *Frasier*, 253 U. S. 233.

But because the States have this power, that is not an authority for the National Government going into a proprietary business.

The Government will no doubt contend that the case of *Arizona* v. *California*, 283 U. S. 423, is an authority in support of the T. V. A. project, and the acts of the Board thereunder. But the decision of that case is controlled by the fact that all of the states involved in the impounding of the waters of the Colorado River entered into what was called the "Colorado River Compact." The decision of the case is, therefore, based upon the fact that the States agreed and granted to the Federal Government, under Article 1, Section 10, Clause 3 of the Federal Constitution, the rights which the Federal Government obtained in enacting the Boulder Canyon Project Act, December 21, 1928, c. 42, 45 Statutes 1057.

Similarly, this Court, in the case of *Pennsylvania* v. *Wheeling &c. Bridge Co.*, 18 How. 421, 430, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an Act of the State of West Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed, Congress declared the bridge a lawful structure and not an obstruction. This Court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

> "* * * That authority combines the concurrent powers of both governments, state and federal, which, if not sufficient, certainly none can be found in our system of government."

The opinion of the Court, by Mr. Justice Brewer, in the case of *South Carolina* v. *United States*, 199 U. S. 437:

> (P. 454.) "The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of government.' Art. IV, sec. 4. *That expresses the full limit of National control over the internal affairs of a State.*"
>
> (P. 456.) "As well said by Chief Justice Nott, delivering the opinion of the Court of Claims in this case * * *:

"'Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's Amendments. * * *

"'If we look upon the Constitution in the light of the common law we are led to the same conclusion. All the avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business and not to exclude him therefrom. *The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals.* Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.'" (Italics ours.)

As was further said in that case,

"Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself."

As there is no enumerated power granting to the National Government the right to enter into a proprietary enterprise or business for profit, in competition with a private business enterprise, there is certainly no implied power, even in the Commerce Clause, or the clause authorizing the Government to dispose of and make all needful rules and regulations with regard to its property.

As was said by Clayton, D. J., in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 613 (D. C. Ala., 1922):

> "This act, providing for navigation and the incidental or servient use of the excess water which would be wasted at the weir, does not exceed the power granted to Congress. It might be that if Congress had adopted a plan for the sole purpose of damming up navigable streams in order to develop and sell water power, such an act would be in excess of the Constitution. The far-reaching effect of such federal policy would be a departure from that manifested by the Act now under consideration. This enactment is for the improvement of the navigability of the stream. This is the paramount object. But an Act which could be reduced to the isolated purpose that the federal government can dam up streams for the sole purpose of generating hydroelectricity, and sell the same, might be obnoxious to our organic law. I think it would be palpably in excess of the powers granted to Congress by the Constitution."

The power over navigable streams may give the Government the right to use the emplacements for any lawful proprietary business which its licensee may establish under the laws of the State. But the generation of electricity is a local matter like any manufacture and there is no power in the Constitution granting to the National Government the right to manufacture and sell electricity to prevent waste or for any other non-governmental use. That it may be a laudable economic principle does not alter the fundamental law of the land.

C. Without reference to the absence of any proprietary right of the United States in surplus waters, the program of commercial operation of a war purpose steam plant as a basis for a general proprietary business in State domain in competition with the State and its citizens is in violation of the Tenth Amendment.

The States and all citizens are directly interested in that phase of the record in this proceeding not dealt with by the Circuit Court of Appeals, viz., the use of the Muscle Shoals

steam plant as a source of power for a region-wide utility transmission and distribution system (F. 14, 19, R. II, 1038, 1039; F. 27, R. II, 1042; F. 32, R. II, 1045; and steam plants, F. 53, R. II, 1050).

In short, whether the Government owns coal or oil or buys or, as in the case of the surplus waters not necessary for navigation, appropriates it without right, there is no lawful right in the Government to process this source of energy into a marketable commodity for sale by the Government for profit or to accomplish the non-federal legislative, economic or political objectives which constitute the dominant and decisive purpose of the Tennessee Valley Authority program.

In conclusion, we beg to point out that the country is divided with these proposed power projects located strategically (see footnote, p. 6 herein), so that, if this "project" is validated, the whole nation can be serviced with electricity by the National Government. Thus the control of the States over local projects would be lost. The vast utility industry of this nation would be destroyed. The National Government would then be able to extend its activities to every branch of industry contrary to the principles upon which this nation was formed.

This Court said in *Kansas* v. *Colorado, supra* (p. 89):

> "This amendment (Tenth) which was seemingly adopted with prescience of just such contention as the present, discloses the widespread fear that the National Government might, *under the pressure of a supposed general welfare,* attempt to exercise powers which had not been granted to it" (italics ours);

and in *South Carolina* v. *United States, supra* (p. 456):

> "The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of powers granted to the central government";

and in *Hammer* v. *Dagenhart, supra* (p. 276):

> "The far-reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end and the power of the State over local matters may be eliminated, and thus our system of Government be practically destroyed."

New York, December 14, 1935.

Respectfully submitted,

COURTLAND PALMER,
JEHU T. STOKELY,
Attorneys for Respondent The Chemical Bank & Trust Company.